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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al.,
Petitioners,

DIVISION OF OIL, GAS AND MINING,
Respondent, and

ALTON COAL DEVELOPMENT, LLC,
KANE COUNTY, UTAH,
Intervenors-Respondents.

Docket No. 2009-019
Cause No. C/025/0005

PETITIONERS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR LEAVE TO CONDUCT DISCOVERY

Pursuant to UT ADC R641-108-900 and Rules 26-37 of the Utah Rules of Civil Procedure, Utah Chapter of the Sierra Club ("Sierra Club"), Southern Utah Wilderness Alliance ("SUWA"), Natural Resources Defense Council ("NRDC"), and National Park Conservation Association ("NPCA")(collectively, "Petitioners") have moved this Board to permit Petitioners to conduct

certain specific discovery of respondent Utah Division of Oil, Gas and Mining ("the Division") and intervenor-respondent Alton Coal Development, LLC ("ACD"). Pursuant to UT ADC R641-104-160, Petitioners support their motion with this memorandum of fact and law in which they address the authority and obligation of the Board to permit discovery in proceedings such as this one, the specific facts and legal issues on which it is appropriate to permit Petitioners to conduct discovery in this proceeding, and issues regarding the timing of Petitioners' requested discovery.

I.

This Board's Authority and Obligation to Permit Discovery

Pursuant to Utah Code § 63G-4-205(1) and UT ADC R641-108-900, this Board has authority to permit discovery in formal adjudications in the manner provided by the Utah Rules of Civil Procedure. The governing regulation provides that the Board may allow discovery "[u]pon the motion of a party and for good cause shown."

The preamble to the federal regulation that governs administrative hearings under approved State programs requires that "the adjudicatory hearing **must** provide for **right** to prehearing discovery." 44 Fed. Reg. 15,105 (Mar. 13, 1979) [preamble to former 30 C.F.R. § 787.11(b), which was subsequently recodified without material change as current 30 C.F.R. § 775.11(b) – *see* Fed. Reg. 44,344-48 and 44,383-84 (Sept. 28, 1983)] (emphasis supplied). Accordingly, the requirement of the Utah regulation that parties show "good cause" for a discovery request can lawfully encompass no more than a demonstration that the requested discovery falls within the broad scope of Rules 26-37 of Utah Rules of Civil Procedure. *See* 30 C.F.R. § 733.11 ("States with an approved State program shall implement, administer, enforce and maintain it in accordance with the [Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 ("SMCRA"), 30 C.F.R. Chapter VII,] and the provisions of the approved State program"); *see also* Syl. pt. 5, *Schultz v.*

Consolidation Coal Co., 197 W.Va. 375, 475 S.E.2d 467 (1996) ("A state regulation enacted pursuant to the West Virginia Surface Coal Mining and Reclamation Act, West Virginia Code §§ 22A-3-1 to -40 (1993), [now West Virginia Code §§ 22-3-1 to -32 (1994 & Supp.1995)], must be read in a manner consistent with federal regulations enacted in accordance with the Surface Mining Control and Reclamation Act, 30 United States Code Annotated §§ 1201 to -1328 (1986)"); *Brown v. Red River Coal Co.*, 373 S.E.2d 609, 610, 7 Va. App. 331 (Va. App. 1988)("Federal legislative history and interpretation must control construction of the state law in these circumstances as a matter of simple federal preemption. A common tenet of modern federalism holds that in substantive areas preempted by the federal government, such as coal surface mine reclamation, states may not enact laws that are less restrictive than or inconsistent with the federal law.") (citation omitted).

The general scope of discovery available under the Utah Rules of Civil Procedure is established by Rule 26(b)(1), which provides that:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 401 of the Utah Rules of Evidence defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Utah R. Evid. 401.

Construing Rule 26(b)(1), the Supreme Court of Utah has held that:

> the ultimate objective of any lawsuit is a determination of the dispute between the parties; and that the earlier and easier this can be accomplished, with justice to both

> sides, the better for all concerned. **Whatever helps to attain that objective is 'relevant' to the lawsuit**.

Ellis v. Gilbert, 429 P.2d 39, 40, 19 Utah 2d 189, 191 (1967) (emphasis supplied). In *Ellis* the Supreme Court emphasized that Rule 26(b) "describes the scope of inquiry in the broader term: 'the subject matter of the action,' rather than the more limited one: the 'issues' to be tried in the case." *Id.* (footnote omitted); *see also Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351 (1978) (defining relevance under F.R.C.P. 26(b)(1) as "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is **or may be** in the case") (emphasis supplied); *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (stating that "the deposition-discovery rules are to be accorded a broad and liberal treatment").

The subject matter of this action is (1) whether the governing statutes and regulations required the Division to withhold approval of ACD's application for a permit to conduct surface coal mining and reclamation operations because it was (and is) inaccurate and incomplete and (2) whether the Division's cumulative hydrologic impact assessment for ACD's proposed mine meets all applicable statutory and regulatory requirements. *See* Utah Code § 40-10-11(c)(2); UT ADC R645-300-133. Because the governing law requires applications for coal mine permits to present extensive information and analyses concerning numerous scientific subjects, *see* UT ADC R645-301, the subject matter of this action is especially broad in scope.

Specifically at issue in this proceeding are, among other things, (1) whether ACD's permit application is accurate and complete with respect to numerous scientific issues, (2) whether the Division's cumulative hydrologic impact assessment ("CHIA") comports with all regulatory requirements and rationally concludes that ACD's operation has been designed to prevent material damage to the hydrologic balance outside the permit area, (3) whether the permit application

included complete and accurate information regarding the proposed Coal Hollow Mine's impacts on cultural/historic resources, (4) whether the permit application included complete and accurate information regarding the proposed Coal Hollow Mine's impacts on air pollution including the visibility impairment of the night sky, (5) whether the permit as approved by the Division includes adequate protections for sage grouse. Thus, Rule 26(b)(1) authorizes discovery in this proceeding of any evidence that has a tendency to demonstrate (1) that ACD's permit application, as approved, was inaccurate or incomplete in any of the respects that Petitioners have alleged, (2) that the Division either failed to adhere to proper procedures in performing its CHIA or reached an arbitrary or capricious conclusion at the end of that exercise, or (3) that ACD's permit application, as approved, did not include complete and accurate information regarding the proposed Coal Hollow Mine's impacts on cultural/historic resources, (4) that ACD's permit application, as approved, did not include complete and accurate information regarding the proposed Coal Hollow Mine's impacts on air pollution, including visibility impairment of the night sky, (5) that the permit as approved by the Division does not include adequate protections for sage grouse.

II.

The Specific Facts and Legal Issues on Which It Is Appropriate To Permit Petitioners to Conduct Discovery

Taken together, Petitioners' request for agency action and the responses of the Division and ACD establish "good cause" for permitting Petitioners to conduct discovery with respect to numerous (a) disputed issues of fact, (b) asserted defenses to liability, presumably as a matter of law, despite admission of Petitioners' pertinent factual allegations, (c) relevant facts or analyses that do not appear in ACD's permit application or the Division's permit approval documents, and (d) disputed issues of law. *See* Wright, Miller & Marcus, *Federal Practice and Procedure* Civil 2d §

2011 at 189 (discovery extends to an opposing party's theory of the facts and the law); *Sargent-Welch Scientific Co. v. Ventron Corp.*, 59 F.R.D. 500, 502 (N.D. Ill. 1973) ("It is well settled that an interrogatory is not objectionable merely because it calls for an opinion or contention that relates to fact or the application of law to fact") (citations omitted). Additionally, as discussed in detail below, the focus of this proceeding on physical conditions of ACD's permit area and the Division's cumulative impact area establish "good cause" to allow Petitioners to inspect, sample, and measure those premises pursuant to Rule 34(a)(2) of the Utah Rules of Civil Procedure. Each of these areas of appropriate discovery is more specifically described in the following sections of this memorandum.

A. Disputed Issues of Fact

Both the Division and ACD generally dispute Petitioners' allegation that ACD's permit application is inaccurate or incomplete in numerous respects. In light of this general dispute Petitioners have good cause to discover the existence and nature of documents or other records (1) that contain information pertinent to disputed aspects of ACD's permit application or the Division's permit approval documents and (2) that ACD or the Division have not yet made accessible to Petitioners or the public. An example of such documents or records would be the field notes, laboratory reports, and monitoring logs that underlie hydrologic and geologic data concerning the permit or adjacent areas that ACD or the Division possesses but has not made a part of either ACD's permit application or the Division's permit approval documents. Petitioners' request for such reports satisfies the relevance standard of Rule 26(b)(1) because the reports would have a tendency to make the existence of the inaccuracy or incompleteness of ACD's permit application or the Division's permit approval documents more probable or less probable than they would be without the reports.

Turning to specific issues on which discovery is appropriate under Rule 26(b)(1), and taking the Division's responses to Petitioners' factual allegations at face value, there are at least the following genuine disputes of material fact between Petitioners and the Division that warrant discovery:

1. whether the permit application includes more than one measurement at monitoring point "SW-4," especially with respect to water quality, and, if so, where the results of additional measurements are located;

2. whether the permit application includes more than three complete data entries for surface water monitoring site "SW-6," especially with respect to water quality, and, if so, where the additional data entries are located;

3. whether the permit application presents surface water baseline data for Sink Valley Wash downgradient of the proposed permit area from more than one monitoring site – "SW-9" – and, if so, (a) where any additional monitoring sites for that area are located and (b) where the data for each such site may be found;

4. whether the permit application contains baseline data for the **ground** water that ACD reports discharging from the saturated alluvial aquifer into the bed of Lower Robinson Creek in or adjacent to the proposed permit area and, if so, where the pertinent monitoring stations and data are located;

5. whether the permit application contains baseline data for ground water in the Dakota Formation in the proposed permit or adjacent areas and, if so, where the pertinent monitoring stations and data are located;

6. whether the permit application contains logs showing lithologic characteristics, thickness, or location of ground water in the Dakota Formation and, if so, where those logs and any associated data are located;

7. whether and to what extent the probable hydrologic consequences determination contained in the permit application is based on baseline hydrologic and geologic information collected for the permit area or adjacent areas;

8. whether the permit application contains hydrologic monitoring plans that describe how the data may be used to determine the impacts of the operation upon the hydrologic balance and, if so, what specific language constitutes the required description;

9. whether the permit application contains an operations plan that describes remedial measures that ACD would undertake in the event that hydrologic monitoring data or

other information indicate that ACD's operations have caused or contributed to material damage the hydrologic balance outside the permit area and, if so, what specific language constitutes the required description;

10. whether the Division's CHIA contains hydrologic data necessary to determine the area within which the probable hydrologic effects of ACD's proposed operations may interact with the actual or probable effects of all anticipated mining in the area and, if so, where those data are located and how the Division used the data to define the cumulative impact area as it did;

11. whether the Division's CHIA includes among the material damage criteria that it does establish all applicable Utah water quality standards;

12. whether the Division received the concurrence of the Utah Division of Wildlife Resources regarding the adequacy of ACD's revised Sage-Grouse Habitat Mitigation Plan dated October 2009; and

13. whether the Division's review of the permit application included an analysis of the impacts of proposed Coal Hollow Mine on the National Register of Historic Places District of Panguitch.

Requesting documents and taking organizational depositions with respect to each of these topics satisfies the relevance standard of Rule 26(b)(1) because the responses of the Division to such requests and depositions would tend to make the inaccuracy or incompleteness of ACD's permit application or the Division's permit approval documents more probable or less probable than they would be without the responses. Additionally, the responses of the Division will enable Petitioners to discover the specific factual and legal bases of the defenses that the Division intends to assert during the evidentiary hearing in this proceeding, thus precluding surprise and allowing Petitioners to identify and present counter-evidence and legal authorities.

Petitioners note that ACD's response to their request for agency action neither admits nor denies Petitioners' specific factual allegations. Consequently, Petitioners are entitled to discover ACD's position on each factual allegation, and the basis for that position, so that Petitioners may know prior to commencement of the evidentiary hearing which issues of fact are in dispute and what

factual evidence ACD intends to produce to support its position on each disputed issue. Such discovery meets the relevance requirement of Rule 26(b)(1) for the reasons discussed in connection with the Division's denials of many of Petitioners' factual allegations.

B. Issues of Fact and Law Raised in the Responses to the Request for Agency Action

Separately from the factual disputes that the Division's denials frame, the Division has admitted a number of factual allegations but then interposed factual or legal claims apparently meant to justify approval of ACD's permit application despite the admitted fact or set of facts. These responses establish "good cause" to permit Petitioners to conduct discovery concerning the factual and analytical bases for the following assertions by the Division:

1. "[t]here is no need for additional surface baseline further south" than ACD's chosen monitoring point 1.5 miles south of permit boundary, even though the Division's cumulative impact area extends 4.5 miles south of that monitoring station in Sink Valley Wash;

2. "the location for monitoring point SW-6 just outside of the permit boundary is the best location to measure potential impacts to" Sink Valley Wash;

3. "the location for monitoring point SW-6 just outside of the permit boundary is the best location . . . to determine any material damage to the hydrologic balance outside of the permit area;"

4. "the monitoring point SW-9 located 1.5 miles from the permit boundary is a better point to measure and monitor potential impacts from the mining operations that any point further south;"

5. "[t]he Cumulative Impact Area (CIA) is conservatively selected based on geology and hydrology of the area to reflect an area outside of which there is little probability of measurable impact to the hydrologic regime;"

6. "[t]here is not (*sic*) need for additional surface baseline further downstream than the location for monitoring point S-2 (*sic*);"

7. "monitoring point S-2 (*sic*) located approximately one quarter mile below the confluence of Kanab Creek and Lower Robinson Creek is the best location to measure and monitor potential impacts to Kanab Creek and to determine any material damage to the hydrologic balance outside of the permit area;"

8. "any point further south than monitoring point S-2 (*sic*) will result in less accurate measurements of mine impact since the further downstream measurements are impacted by dilution, infiltration, and evapotranspiration that will impact the parameter values being measured;"

9. "for this mine location there is surface baseline data from all source (*sic*) to determine the hydrolgy (*sic*) of the area and the indications of no flow at some dates for some ephemeral and intermittent drainages does reflect the surface water quantity and quality as required;"

10. "the Dakota Formation that lies beneath the coal, is relatively impermeable, and is at the surface or under a thin alluvial deposit in the area south of the permit area;"

11. "[t]he Division's determination of the Cumulative Impact Area was conservatively based on the potential surface water impacts since this is the greater area of possible impact;"

12. "[t]he extent of the area of impacts for ground water is expected to terminate at a more northern boundary near the current groundwater monitoring site;"

13. "the groundwater system in the area of the mine is separated from the ground water system in the Kanab drainage by the coal outcrop and Dakota Formation that surfaces between the proposed mine and Kanab Creek drainage;"

14. "[t]here is no hydrologic connection between the area to be mined and the Kanab Creek ground water system ;"

15. "[t]he presence of the Tropic Shale overlying the Dakota Formation inhibits recharge of the Dakota Formation from any overlying alluvial groundwater resources;"

16. "[t]here is no use of water from the Dakota Formation;"

17. "it was not possible to meaningfully determine rates of discharge, usage and a depth to water for the Dakota Formation below the coal seam;"

18. "many of the water rights were not monitored on the surface because flow levels were extremely low all year long;"

19. "the applicant fulfilled the obligations [to collect baseline hydrologic data concerning each source of water covered by existing water rights] by establishing a comprehensive monitoring plan and provided sufficient information to establish water quality and quantity of representative sites for surface and ground water sources of water;"

20. "[a]lthough the permit application does not contain water quality and quantity data for every quarter or season since 2005 for all of the springs and wells identified, ACD has submitted sufficient information to conform to the surface and groundwater monitoring plan in Tables 7-4, 7-5, 7-6 and 7-7 . . . [and] . . . [t]his information is also adequate to determine identify potential impacts and probable hydrologic consequences for the permit and adjacent area;"

21 "Figure 14 of the Appendix 7-1 is a map with contour lines and that it shows the seasonal differences in head in the alluvial aquifer for the proposed permit area and the adjacent areas;"

22. "information on exploratory bore holes CH-Ol-O5, CH-03-O5,CH-O5-05,CH-06-05, and CH-08" is sufficient to establish the "lithologic characteristics, thickness, or location of ground water" in the Dakota Formation as a whole;

23. "[t]he geologic and hydrologic data support the Division's determination that the Dakota Formation doe[s] not possess characteristics of an aquifer [because]. . . [t]here is very little water found in the Formation [and] it is very low permeability;

24. "[t]he application contains substantial additional information [concerning the question whether Sink Valley Wash is an alluvial valley floor] that was not evaluated in the earlier determinations;"

25. "[t]he new information including hydrologic and geologic cross-sections supported a Division finding that the permit area and adjacent areas were not alluvial valley floors due to a lack of characteristics required to satisfy the legal definition of the Coal Act of an alluvial valley floor;"

26. "[p]rovided the operational requirement for placement of overburden are met, the Division did not find that material damage criteria for these constituents [boron and selenium] was needed in the CHIA;"

27. "[t]he published water quality data for the Alton Sink Valley has been compiled and evaluated by the U.S. Geological Survey and has reported that baseline levels [of total dissolved solids] in the Sink Valley area of 3000 mg/L range are common . . . [and] . . . represent pre-mine background conditions;"

28. "[c]ompliance with the Clean Water Act standard [for total dissolved solids] will be required by the UDES permits and monitoring;"

29. "[t]he regulations regarding the required hydrologic baseline data . . . are not 'black or white' nor 'fill-in the square for each quarter' type of standards, but are standards requiring the judgment of a hydrologist familiar with the science and methods of water sampling and interpretation;"

30. "[the Tech 004] guidelines are nothing more than guidelines and must be adapted to the circumstances of the sampling location and the type of permit application;"

31. "[t]he measurement of the amount of spring flow data from snow melt is significant, but the 'no flow' measurement for a dry period is also indicative of the nature of the hydrologic regime and significant;"

32. "requiring that there must be a measurement of some sort of some real flow of water during each quarter if rigidly applied would lead to false characterization based on one event, or no characterizations for many ephemeral and intermittent streams for which the hydrologic characterization is needed to create a baseline and to ultimately determine the probable hydrologic consequences;"

33. "the data in the application supports a determination that the hydrologic conditions prior to the onset of mining are described in sufficient detail so as to monitor the impacts of mining;"

34. "there were no floodplain or terrace features and that the geomorphology of [Sink Valley Wash] consists of alluvial fans, which even if subirrigated, are by legal definition excluded from classification as alluvial valley floors;"

35. "[t]he prior determinations [concerning the status of Sink Valley Wash as an alluvial valley floor] did not include the same geologic and hydrologic facts, relied in part on incomplete investigations and failed to apply the statute's definition as the plain reading requires;"

36. "new information including hydrologic and geologic cross-sections supported a Division finding that the permit area and adjacent areas were not alluvial valley floors due to a lack of characteristics required to satisfy the legal definition of the Coal Act of an alluvial valley floor;"

37. "[a]lthough the Kanab Creek drainage is acknowledged to be an alluvial valley floor the Division did consider the potential for the mining operations to affect this area and has determined that it is not reasonable to anticipate any impact to the ground water hydrology in the Kanab Creek drainage area;"

38. "[t]he Division has found that the monitoring plan as set out in the application provides for an accurate characterization of the hydrologic regime prior to mining and will allow for a thorough monitoring of the effects of mining on the streams and groundwater hydrology of the permit and adjacent area;"

39. "[t]he required information of water availability is not specific as to a specific required quantity but need only address the potential for loss and the amount of pre-mining uses;"

40. "[t]he underlying strata preclude the effect from mining having a hydrologic connection with the ground water systems below the coal;"

41. "Lower Robinson Creek is an intermittent stream . . . [which] the proposed mine is projected to mine through . . . and re-establish . . . upon completion of mining . . . [t]here is no requirement for a waiver of the stream buffer zone rule for this type of impact since the requirements . . . . (*sic*)."

Similarly, in addressing Petitioners' statement of issues, ACD's response to the request for agency action in this proceeding establishes "good cause" to permit Petitioners to conduct discovery concerning the factual, scientific, and legal bases for the following assertions:

1. "Petitioners' argument regarding the adequacy of baseline hydrologic data is . . . premised on an unstated and supported assumption: that any measurement where water was not present to be sampled is not a valid scientific observation and must be treated as missing data;"

2. "it is neither legal nor scientific error to record non-zero numerical measurements to characterize seasonal conditions in the ephemeral drainages of the Coal Hollow area;"

3. "the seasonal condition of the stream did not permit sample collection and analysis;"

4. "some monitoring sites are not configured to retrieve samples for analysis;"

5. "the Division has properly considered new evidence presented by Alton Coal Development, LLC to confirm that the defining geological characteristics required by R. 645-302-321.300 are not present for an alluvial valley floor ("AVD") within or adjacent to the permit area;"

6. "previous AVFR studies which were not conducted in the detail with which Alton's studies were prepared;"

7. "Alton provided new and supplemental information regarding land use, soils and hydrology which was considered by the Division in reaching its new findings;"

8. "the Division correctly determined that no flood plains or streams terrace deposits characteristic of AVF's were identified in the project area. TA at p. 34. This finding was confirmed by the Division in field examinations of the mine site conducted on October 1,2,2008;"

9. "the Division established that the area south of the mine in the Sink Valley Wash has no potential for irrigation or sub-irrigation and is not on (*sic*) AVF;"

10. "Alton's operations will not disturb the essential hydrologic functions of the 'probable' Kanab Creek AVF;"

11. "Petitioners' argument with respect to the PHC is rooted entirely in its argument alleging inadequate baseline hydrological data;"

12. "placement of sampling stations downstream from the project, should be decided based upon evidence supporting or refuting Petitioners' claim that 'good scientific practice' requires such monitoring;"

13. "surface mining operations at Alton affect only shallow deposits;"

14. "[b]ecause the surface mining operations at Alton affect only shallow deposits, effects on groundwater are also limited to the alluvial aquifers at the surface and generally in contact with surface water systems;"

15. "it is reasonable to treat the [ground water and surface water] impact areas for CHIA purposes as coextensive;"

16. "Petitioner must present evidence, if it has any, regarding the extent of aquifers affected by mining operations to satisfy its burden of proof on [the CHIA] issue;" and

17. "Petitioners' argument fails to explain why material *damage* attributable to mining should be found when TDS concentrations in surface water are observed at levels frequently observed prior to initiation of mining operations."

The factual and legal contentions upon which the Division and ACD base each of the foregoing assertions are relevant to this proceeding because each of those contentions has a tendency to make Petitioners' corresponding assertions of error in the Division's decision to approve ACD's permit application more or less probable than they would be in the absence of full explication of those factual and legal contentions. Additionally, discovering the specific factual and legal bases of the claims that the Division and ACD intend to assert in this proceeding will preclude surprise and allow Petitioners to identify and present counter-evidence and legal authorities. Finally, permitting Petitioners to request documents containing any information related to these assertions that ACD did not include in its permit application or that the Division did not include in its permit

approval documents (1) will allow Petitioners to ascertain whether additional information concerning baseline hydrologic conditions, the existence of alluvial valley floors, the delimitation of the cumulative impact area, or the selection of material damage criteria should have been presented and considered, but was not and (2) will allow Petitioners to conduct the evidentiary hearing without confronting potential surprise factual or legal argument.

C. Adherence to Federal or State Guidelines

Discovery is appropriate concerning (1) the existence of, (2) the Division's adherence to, or (3) the Division's rationale for any deviation from, federal or State guidelines for the presentation and evaluation of adequate baseline hydrologic information, probable hydrologic consequences determinations, hydrologic monitoring plans, hydrologic reclamation plans (or "hydrologic operating plans"), or CHIAs. Although agency guidelines do not have the same force of law as regulations, they embody settled custom and practice for implementing the requirements of SMCRA which this Board must consider in evaluating Petitioners' challenge to the Division's permit approval decision. Responses to such discovery will have at least a tendency to make Petitioners' claims of Division error more or less probable, and thus such matters are properly discoverable under Rule 26(b)(1).

D. Adherence to Principles of Hydrogeology Discussed in Pertinent Scientific Literature

Similarly, discovery is appropriate concerning (1) the existence of, (2) the Division's adherence to, or (3) the Division's rationale for any deviation from, principles of the science of hydrogeology discussed in pertinent scientific literature concerning the presentation and evaluation of (a) adequate baseline hydrologic information to characterize the hydrologic balance of an area, (b) probable hydrologic consequences determinations, (c) hydrologic monitoring plans, (d) hydrologic reclamation plans (or "hydrologic operating plans"), or (d) CHIAs. Although scientific

literature does not have the force of law, it describes settled custom and practice for performing the hydrologic investigations and analyses that SMCRA requires and which this Board should consider in evaluating Petitioners' challenge to the Division's permit approval decision. Responses to such discovery will have at least a tendency to make Petitioners' claims of Division error more or less probable, and thus such matters are properly discoverable under Rule 26(b)(1).

E. Contact Between ACD, the Division, and the Office of the Governor of Utah

Discovery of documents and deposition testimony related to the nature and extent of contacts between the Office of Governor of the State of Utah, the Division, and ACD is relevant to Petitioners' claim that the Division's failure to withhold approval of ACD's permit application in light of its inaccuracies and incompleteness was arbitrary, capricious, and contrary to law. The Division's own approval document indicates that a meeting between Governor Huntsman's office and ACD on September 17, 2009, resulted in conclusion of the permitting process on October 15, 2009. *See* Utah Division of Oil Gas and Mining, State Decision Document and Application Approval, 3 (October 15, 2009).

Such an abrupt end to the permit evaluation process establishes a potential reason for the Division's erroneous approval of ACD's permit application. Any information relating to contacts between ACD, the Division, and the Office of the Governor regarding ACD's permit application is relevant to this proceeding, is not privileged, protected, overly broad, or unduly burdensome, and is therefore discoverable. Documents or testimony relating to meetings between the Governor and ACD or the Division would have a tendency to make the existence of an improper relationship or possible influence over the Division's decision to approve the mine more or less probable. Thus, such information is therefore relevant under rule 26(b)(1) of the Utah Rules of Civil Procedure. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. at 351 (defining relevance under F.R.C.P. 26(b)(1)

as "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case"); *Hickman v. Taylor*, 329 U.S. at 507 (stating that "the deposition-discovery rules are to be accorded a broad and liberal treatment").

As with discovery discussed earlier in this memorandum, the information at issue concerning the Governor's Office meeting is not privileged: it does not concern a protected relationship, privileged communication between an attorney and her client, or attorney work product. Rather, it relates to conversations between a private corporation and governmental entities—the Governor's Office and the Division. Petitioners have described the request for deposition testimony and relevant documents in a way that is not "overly broad" or "unduly burdensome." *See Compagnie Francaise D'Assurance Pour Le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 42 (S.D.N.Y. 1984) (explaining that the objecting party bears the burden of demonstrating "specifically how, despite the broad and liberal construction afforded the federal discovery rules, each [request] is not relevant or how each question is overly broad, burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden"). As a result, the information sought is relevant and discoverable.

III.

Petitioners Are Entitled to Enter and Inspect the Permit Area and Portions of the Cumulative Impact Area to Which ACD May Lawfully Provide Access

Rule 34(a)(2) of the Utah Rules of Civil Procedure authorizes a party to request that any other party permit entry on land so that the requesting party may inspect, measure, survey, photograph, test, or sample the property. Inspection of the permit area and designated portions of the cumulative impact area by Petitioners' counsel and consultant on geology and hydrology is necessary to enable Petitioners' counsel and consultant to develop a reasonably equivalent

familiarity with the subject lands as counsel, consultants, and scientific employees of the Division and ACD have developed or have the unfettered capability to develop, so that (a) Petitioners' counsel may effectively present Petitioners' evidence and formulate cross-examination of adverse witnesses, (b) Petitioners may avoid surprise at the evidentiary hearing in this matter, and (c) Petitioners' consultant may present his intended testimony in light of personal observation of the lands in question rather than solely on the basis of reviewing documents. Petitioners' inspection of the areas in question is also necessary to enable Petitioners' consultant to verify or detect error in the various geological and hydrological data or analyses that ACD has submitted and that the Division has approved with respect to ACD's permit application.

Authorizing Petitioners' request for access to the lands at issue would not prejudice the rights of any party or to this proceeding. Petitioners will conduct a minimally intrusive inspection. Moreover, based on information and belief, ACD's permit has not yet issued and therefore no surface coal mining and reclamation operations have yet occurred on the area that Petitioners seek to inspect.

In an effort to secure unfair advantage for its own expert witnesses and attorneys and to impair the search for truth in this proceeding, ACD opposed Petitioners' earlier request for entry on ACD's permit area and parts of the related "cumulative impact area." ACD identified no impairment of its own interests that Petitioners' inspection, measurement, or testing of these areas might cause.

Instead, ACD argued that Petitioners' request was untimely and unnecessary on the principal ground that Petitioners did not conduct a complete factual investigation during the informal conference on ACD's permit application or in exercising other public participation opportunities prior to the Division's approval decision. Anticipating similar opposition by ACD to their renewed

request for access to the permit area and adjacent lands, Petitioners reiterate that ACD's earlier arguments were and are inconsistent with the express provision for discovery during proceedings before the Board prior to formal evidentiary hearings on requests for review of agency decisions.

ACD also asserts that Petitioners have failed to show good cause for entry on their land because the land can be viewed from areas that are open to public access. For reasons explained below, the fact that Petitioners may view the land at issue from some distance on public property does not negate their showing of good cause for inspecting, measuring, or testing features on that land such as the alluvial valley floor, the several springs, the proposed locations of mining pits, and the locations and character of ephemeral, intermittent, or perennial streams.

To begin with, the "contention that a showing of need is a prerequisite for an order to compel inspection is incorrect." *Cuno Inc. v. Pall Corp.*, 116 F.R.D. 279, 281 (E.D.N.Y. 1987) (construing Rule 34(a)(2) of the Federal Rules of Civil Procedure). Indeed, "inspections are not an extraordinary means of discovery" – a party requesting inspection need only show that the inspection is relevant to the proceeding at hand, and an inspection that pertains to the processes in question meets the relevance standard. *Id.*

Even if the sole object of Petitioners' inspection request was to obtain evidence that either counters ACD's hydrologic baseline data or exposes error in the conclusions that ACD and the Division drew in preparing and approving the permit application, Petitioners' requested inspection would meet the relevance standard because **that** purpose of the inspection is plainly meant to produce evidence to meet Petitioners' burden of proving error in the Division's approval of ACD's permit application.

Indeed, ACD's response to Petitioners' request for agency action asserts that Petitioners bear the burden of proving at least two matters that require inspection of the permit area. First, after

arguing that "the Division correctly determined that no flood plains or streams terrace deposits characteristic of AVF's were identified in the project area" and noting that "[t]his finding was confirmed by the Division **in field examinations of the mine site** conducted on October 1,2,2008," ACD Response at 5 (emphasis supplied), ACD asserts that "Petitioners have failed to refute the Division's AVF determination with any credible evidence or data contradicting the Division's findings." *Id.* Second, ACD insists that "Petitioner (*sic*) must present evidence, if it has any, regarding the extent of aquifers affected by mining operations to satisfy its burden of proof on [the CHIA] issue." ACD Response at 13. Although Petitioners do not agree that they have an affirmative burden to produce the evidence ACD demands, the company's argument and prudent management of this litigation compel Petitioners to conduct an investigation of the permit area for the purpose of developing proof on these issues rather than simply rest on the Division's prior positive AVF determination.

In addition, ACD's response to Petitioners' request for agency action asserts that "some monitoring sites are not configured to retrieve samples for analysis." ACD Response at 4. Petitioners are entitled to investigate this admission and to evaluate, on the ground, the effect that including such dysfunctional monitoring sites had on ACD's baseline hydrologic data collection program.

Finally on this score, ACD's argument that "placement of sampling stations downstream from the project, should be decided based upon evidence supporting or refuting Petitioners' claim that 'good scientific practice' requires such monitoring," ACD Response at 6, underscores that Petitioners' access to the permit area and controlled portions of the cumulative impact area for development of evidence may prove critical in this litigation. Against that backdrop, to argue that Petitioners have the burden of producing evidence that can only come from physical investigation

of the permit and adjacent areas, while at the same time opposing Petitioners' access to those areas, is to argue for a fatally flawed proceeding that denies Petitioners due process and fails to receive all the evidence that Congress and the Utah legislature meant this Board to consider in permit review proceedings.

Apart from the development of counter-evidence, however, Petitioners request access to the mine site for a more fundamental reason. Petitioners' attorneys and experts require access to the mine site to develop an understanding of the data, studies, and conclusions contained in the administrative record which is reasonably equivalent to the understanding that ACD's attorneys and experts have developed through the unfettered access that ACD has provided them. An attorney or scientific expert who has an opportunity to observe a mine site personally is certainly better able to perceive the strengths and weaknesses of the conclusions concerning that site that are stated on paper in the administrative record.

After all, the administrative record is largely a controlled presentation shaped by ACD and, to a lesser extent, by the Division. Although public comment is included in the administrative record, such comment has been prepared and submitted without the benefit of site access. Accordingly, a site inspection during discovery in this proceeding is the only opportunity that Petitioners, their attorneys, and their scientific experts would have (1) to gain an understanding of the administrative record equivalent to that of their counterparts and (2) to test the accuracy and completeness of the data and conclusions presented in the permit application. To deprive them of that opportunity would substantially impair the search for truth in this proceeding as well as Petitioners' ability to prepare their case in a competent, professional manner. *See Eirhart v. Libby-Owens-Ford Co.*, 93 F.R.D. 370, 371 (N. D. Ill. 1981) (compelling inspection to allow observation of defendant's controlled experiment because plaintiffs would be "far better able to treat with the

offered test findings if they have been able personally to observe the manner in which the test is conducted").

Indeed, courts have frequently admonished attorneys who fail to conduct site visits during discovery in cases where the condition of premises is at issue. As the United States Court of Appeals for the Seventh Circuit observed in a recent premises liability case:

> The record contains no picture of the fryer or even identification of the brand or model. The plaintiff's lawyer told us that he could not gain access to the restaurant to look at the fryer and hood, which is absurd; hasn't he heard of pretrial discovery? (See Fed.R.Civ.P. 34(a)(2).) Well, maybe not, because he conducted no discovery at all. As a result, nothing is known about the source of the crack in the globe, or, if the globe was already broken when the plaintiff's arm touched it, the cause of its being broken. The globe could have been defectively designed by the manufacturer, defectively installed or manhandled by the manufacturer of the fryer hood, damaged in shipment, damaged by an employee of the restaurant, damaged by another employee of the plaintiff's company or by the plaintiff himself on a prior visit to clean the hood. We shall never know.

Torrez v. TGI Friday's, Inc., 509 F.3d 808, 810 (7th Cir. 2007); *see also Mesman v. Crane Pro Services*, 409 F.3d 846, 850 (7th Cir. 2005) (noting that a defendant's refusal to allow plaintiff's expert to inspect an industrial plant did not preclude the grant of a new trial "since the plaintiffs could easily have obtained an order directing [the defendant] to allow the visit"); *Albany Bank & Trust Co. v. Exxon Mobil Corp.*, 310 F.3d 969, 974 (7th Cir. 2002) (noting that "Now that the litigation is underway, assuming Exxon still wishes to inspect the land for contamination, Albany **will have to permit entry** during discovery under Fed. R. Civ. P. 34(a)(2)") (emphasis supplied).

ACD has failed to show that the request will cause the company "annoyance, embarrassment, oppression, or undue burden or expense" – and those are the only reasons that the governing rule recognizes for entry of a protective order. A simple visit by professionals and two lay representatives to ACD's currently undeveloped permit area would not interfere in any respect with the activities that ACD may lawfully conduct on that land at present. Moreover, permittees of coal

mines are by law subject to random inspection by a host of federal and state regulators, as well as by citizens who accompany those inspectors in certain circumstances. The notion that the limited inspection that Petitioners request is unduly onerous lacks any degree of merit.

ACD cites no support for its implicit contention that Petitioners must first identify defects in the administrative record before conducting their requested site visit. As stated earlier, the purposes of the site visit are (1) to develop better understanding of the written descriptions and analyses presented in the administrative record and (2) to identify any deficiencies in the administrative record that personal observation may disclose. ACD's opposition papers incongruously ask this Board to deny access to the mine site because Petitioners do not yet fully know whether a personal observation of the property will reveal deficiencies in the permit application or precisely what those deficiencies might be. The very purpose of discovery is to answer the questions on which ACD's opposition rests; it makes utterly no sense to deny discovery because Petitioners don't yet have all of the answers.

IV.

The Timing of Petitioners' Requested Discovery

Petitioners propose to propound their requests for production of documents first, to take the Rule 30(b)(6) deposition of the Division second, the Rule 30(b)(6) deposition of ACD third, and, due solely to current weather conditions, to conduct their inspection of the permit area and cumulative impact area fourth. Petitioners are prepared to serve their requests for production of documents no later than the next business day after receiving the Board's authorization to do so. Absent stipulation of the parties or an order of the Board shortening the response period, the Division and ACD would be obligated to respond no later than 30 days after such service. Petitioners propose to take the Rule 30(b)(6) depositions of the Division and ACD beginning on the

fourth business day after Petitioners' receipt of responses to their requests for production of documents and to continue such depositions from day to day until they conclude. Petitioners stand ready to cooperate with the Division and ACD in developing any alternate schedule that better serves the interests of all parties.

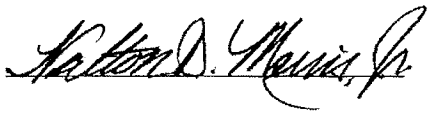
Petitioners cannot effectively inspect, survey, or sample the permit area and cumulative impact area until the current snow cover disappears. Petitioners understand that this will likely occur in late April or early May 2010. Petitioners stand ready, however, to commence their requested inspection no more than five business days after ACD or the Division inform Petitioners that the snow cover has disappeared. Petitioners anticipate concluding their inspection within three days time.

Conclusion

For the reasons stated in this memorandum and in previous pleadings and oral statements concerning discovery in this proceeding, Petitioners request that the Board enter an order granting leave to conduct discovery as set forth in Exhibits 1-5 to Petitioners' Motion for Leave to Conduct Discovery, in accordance with the timing plan stated earlier in this memorandum or such alternate timing plan as the parties or the Board may devise.

Dated: January 15, 2010

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of January, 2010, I served a true and correct copy of **PETITIONERS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR LEAVE TO CONDUCT DISCOVERY** on each of the following persons via electronic mail:

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